GENNEVA MALAYSIA SDN BHD v. ABDUL GHANI SHER MOHAMAD

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL APPEAL NO: WA-12BNCC-38-08-2016]
14 JUNE 2017

CONTRACT: *Agreement – Contract of purchase – Purchaser purchased gold from company via Customer Purchaser Order Form ('CPO') – Company failed to deliver gold to purchaser – Purchaser claimed for return of monies – Whether CPO merely offer to purchase – Whether there was valid contract between purchaser and company – Whether company breached contract – Company's bank account frozen and seized under Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') – Purchaser's failure to obtain public prosecutor's consent to file suit – Whether purchaser's claim premature and statute-barred for non-compliance of s. 54(3) of AMLATFA*

This was an appeal by the appellant ('the defendant') against the decision of the Sessions Court Judge ('the SCJ') allowing the claim of the respondent ('the plaintiff'), *inter alia*, for the defendant to return the sum of RM654,000 to the plaintiff, being the amount paid for the purchase of 3,000g of 999.9 gold ('the said gold'). The plaintiff alleged that *via* the 'Customer Purchase Order Form' ('the CPO'), he had purchased from the defendant, a company involved in the business of selling and trading gold, the said gold at the price of RM654,000. The plaintiff alleged that he had paid the defendant two cheques and claimed that despite the full purchase made by the plaintiff, the defendant failed to deliver to the plaintiff the said gold. The plaintiff demanded the defendant deliver the said gold to the plaintiff but the defendant failed to comply with the said demand. The plaintiff then claimed that the defendant had breached the terms of contract of purchase of the said gold and/or the said contract was invalid as there was no consideration from the defendant. The plaintiff subsequently issued a notice of demand to the defendant terminating the contract of purchase of the said gold and demanded that the defendant return the sum of RM654,000; however the defendant failed to comply with the said demand. Thus, the plaintiff prayed for judgment for the said sum. The defendant, on the other hand, denied entering into the sale and purchase agreement with the plaintiff and stated that the CPO was only an offer by the plaintiff to the defendant. The defendant submitted that the CPO specifically provided that the offer shall not bind the defendant until it was accepted in writing by the defendant. There was no evidence that the plaintiff's offer was accepted by the defendant. According to the defendant, the account into which the monies were deposited was frozen and the monies seized under the provisions of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA'). Thus,

it was argued that the plaintiff failed to obtain the Public Prosecutor's consent as required under s. 54(3) of the AMLATFA before filing this suit. The issues that arose were (i) whether there was a valid contract between the plaintiff and the defendant; (ii) whether the defendant had breached the contract to purchase the gold; (iii) whether the plaintiff's claim was premature and unlawful for failure to comply with s. 54(3) of the AMLATFA and for failure to obtain sanction from the Public Prosecutor prior to the filing of this action by the plaintiff; (iv) whether the CPO and the buyer profile had been tampered with; and (v) whether the CPO and the buyer profile were correctly marked as P4 and P5 by the SCJ.

Held (allowing defendant's appeal; striking out plaintiff's claim with liberty to file afresh):

(1) The CPO relied on by the plaintiff was only an offer to purchase. The CPO contained the express provision of 'I/We hereby declare that we are aware that this offer does not bind Genneva until it is accepted in writing Genneva' (condition for acceptance clause). This fell under the category of 'a condition or term of the bargain'. Therefore, a contract to purchase gold was not formed. No valid contract to purchase the gold had come into existence. (paras 24-30)

(2) The SCJ had erred in her finding that the defendant's failure to provide a sale and purchase agreement amounted to a breach of contract by the defendant for two reasons (i) the period of 10-20 days to deliver the gold was only the normal procedure of the defendant and could not be treated as a condition; and (ii) the CPO was dated 20 September 2012. Evidence showed that ten days later, on 1 October 2012, Bank Negara Malaysia had raided the defendant's premises and seized all the gold stock, cash, documents, files and computer records of the defendant. The raid was conducted to assist Bank Negara Malaysia in their investigations under the Banking and Financial Institutions Act 1989 ('the BAFIA') and the AMLATFA. All of the defendant's bank accounts were also frozen. The defendant could not conduct any further business. On a balance of probabilities, the defendant had not accepted the plaintiff's offer and the defendant could not be held to be in breach from 1 October 2012 as the defendant could not accept the plaintiff's offer and prepare the sale and purchase agreement. (paras 39-42)

(3) The plaintiff's submission that its claim was not against the seized assets but was for breach of contract was misconceived. There was no established contract. What the plaintiff was in fact seeking was for the refund of the money which was deposited by the plaintiff into the defendant's bank account that had been frozen and seized. Thus, the plaintiff's claim was premature and/or statute-barred for non-compliance of s. 54(3) of the AMLATFA as the plaintiff had not

obtained the public prosecutor's consent to file this suit. The SCJ erred in her finding that the action by the plaintiff was valid and lawful. (paras 47-53)

(4) As to whether the CPO and the buyer's profile had been tampered with, the CPO ('ID4') and the buyer's profile ('ID5') which were carbon copies of the original were admissible as evidence. The original copy of 'consultant copy' had been handed over and its receipt was acknowledged by the defendant. Therefore, evidence of carbon copy could be tendered through the defendant's employee as per the provision of s. 73A of the Evidence Act 1950. Thus, there was no evidence of tampering and the SCJ had correctly marked ID4 and ID5 as exhs. P4 and P5. (paras 19-20)

Case(s) referred to:

Bigg & Anor v. Boyd Gibbins Ltd [1971] 2 All ER 183 ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Daiman Development Sdn Bhd v. Mathew Lui Chin Teck and Another Appeal [1978] 1 LNS 42 FC ***(refd)***
Dato' Zahari Sulaiman v. Genneva Sdn Bhd [2011] 6 CLJ 219 HC ***(refd)***
Griffiths v. Young [1970] Ch 675 ***(refd)***
Harichand v. Govind [1923] 50 IA 25 ***(refd)***
JN Roland and Scott Ltd. v. Yangtzekiang Garment Manufacturing Co Ltd [1978] 8 Hongkong Law Journal ***(refd)***
Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 1 CLJ 233; [1983] CLJ (Rep) 231 FC ***(refd)***
Ooi Thean Chuan v. Banque Nationale De Paris [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160 HC ***(refd)***
Shankarlal Narayandas Mundade v. New Mofussil Company Ltd [1946] 73 IA 98 ***(refd)***
Thomas Borthwick (Glasgow) Ltd v. Bunge & Co Ltd [1969] 1 Llyod's Rep 17 ***(refd)***
Tube Home (M) Sdn Bhd v. P Shanmugam & Anor [2010] 10 CLJ 678 HC ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 44, 50, 54(3)
Evidence Act 1950, ss. 62, 63, 66, 73A
Sales of Goods Act 1957, s. 36(2)

Other source(s) referred to:

PS Atiyah, *The Sale of Goods,* 8th edn, p 108

For the appellant/defendant - Hargopal Singh; M/s Hargopal Singh & Co
For the respondent/plaintiff - Muhammad Azim Abd Ghani; M/s Lainah Yaacob & Zulkepli

Reported by Suhainah Wahiduddin

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JUDGMENT

Lau Bee Lan J:

Introduction

[1] This is an appeal by the appellant/defendant against the decision of the learned Sessions Court Judge ('SCJ') made on 12 August 2016 allowing the claim of the respondent/plaintiff as follows:

(i) Defendant to return the sum of RM654,000 to the plaintiff being the amount paid for the purchase of 3,000g of 999.9 gold;

(ii) interest at the rate of 5% on the judgment sum from 20 September 2012 till full realisation; and

(iii) costs of RM5,000.

[2] I shall for purposes of this appeal refer to the parties as they were referred to in the Sessions Court. Having heard the appeal I had varied the decision of the learned SCJ and I had struck off the plaintiff's claim with liberty to file afresh with no order as to costs here and below. In other words I had allowed the appeal of the defendant with no order as to costs. The reasons for my decision are set out below.

The Plaintiff's Case

[3] The plaintiff is an individual. The defendant is a company which at the material time was involved in the business of selling and trading gold.

[4] The plaintiff alleged that *via* "Customer Purchase Order Form" ('CPO') dated 20 September 2012, the plaintiff purchased from the defendant 3,000g of '999.9 Gold' at the price of RM654,000. It was further alleged the purchase transaction was conducted by one Sharifah Sharmila binti Sheikh Kutubdin, the representative and/or agent of the defendant.

[5] The plaintiff alleged that he had paid the defendant *via* two cheques namely "Maybank Islamic Berhad" No. 147437 and "Maybank Berhad No. 009622" in the total sum of RM654,000 being the price for the purchase of 3,000g of the "999.9 Gold".

[6] The plaintiff claimed that despite the full purchase made by the plaintiff, the defendant had failed to deliver to the plaintiff the 3,000g of "999.9 Gold" purchased.

[7] The plaintiff demanded the defendant *via* a letter dated 23 November 2012 to deliver the 3,000g of "999.9 Gold" to the plaintiff but the defendant failed to comply with said demand.

[8] The plaintiff claimed that the defendant had breached the terms of contract of purchase of the 3,000g of "999.9 Gold" and/or the said contract was invalid as there was no consideration from the defendant.

[9] The plaintiff had issued a notice of demand dated 18 November 2015 to the defendant terminating the contract of purchase of the 3,000g of "999.9 Gold" and demanded the defendant to return the sum of RM654,000; however the defendant had failed to comply with the demand. The plaintiff prayed for judgment for the sum of RM654,000, interest and costs.

The Defendant's Case

[10] The defendant denied entering into the sale and purchase agreement with the plaintiff.

[11] The defendant stated that the CPO was only an offer by the plaintiff to the defendant.

[12] The CPO specifically provided that the offer shall not bind the defendant until it is accepted in writing by the defendant.

[13] There is no evidence that the plaintiff's offer was accepted by the defendant.

[14] The account into which the defendant deposited the moneys, namely, CIMB Islamic Bank Account No. 14560000662104 is frozen and the monies seized under the provisions of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') since 1 October 2012.

[15] The plaintiff failed to obtain the Public Prosecutor's consent as required under s. 54(3) of the AMLATFA before filing this suit.

The Primary Issues

[16] There are principally five main issues which can be gleaned from grounds of appeal in the memorandum of appeal. They are whether the learned SCJ has erred in fact or in law in her findings:

(i) In concluding that there was a valid contract to purchase gold between the plaintiff and defendant ('Issue 1');

(ii) Whether the defendant had breached the contract to purchase 3,000g of 999.9 gold dated 20 September 2012 ('Issue 2');

(iii) Whether the plaintiff's claim is premature and unlawful for failure to comply with s. 54(3) of the AMLATFA and for failure to obtain sanction from Public Prosecutor prior to filing of this action by the plaintiff ('Issue 3');

(d) Whether CPO (P4) and Buyer Profile (P5) have been tampered ('Issue 4'); and

(e) Whether CPO and Buyer Profile which initially were marked as ID4 and ID5 respectively were correctly marked as P4 and P5 by the learned SCJ ('Issue 5').

Findings

Issue 4 And Issue 5

[17] I shall deal with Issues 4 and 5 together. In respect of whether the CPO (ID4) and the buyer profile (ID5) have been tampered and the admissibility of the said documents, the learned SCJ held in her grounds of judgment (p. 158 of the appeal record ('AR') the following:

> Untuk menyangkal dakwaan ini, Plaintif telah mengemukakan salinan asal yang disimpan oleh konsultan (SP4). Dokumen-dokumen ini juga disahkan oleh DW1 adalah berasal (originate) daripada Defendan. Tiada sebarang bukti untuk menunjukkan bahawa dokumen ini telah diusik.
>
> Bermula daripada ID4 dan ID5, pembayaran dibuat kepada Defendan dan ini dibuktikan melalui 'cheque bud' dan penyata akaun. Sekali lagi ditunjukkan bahawa wang yang dibayar oleh Plaintif telah masuk kedalam akaun Defendan dan cek-cek itu telah ditunaikan. DW1 sendiri mengakui ID4 dan ID5 diterima oleh Defendan berdasarkan tandatangan yang dikenalpasti sebagai tandatangan pekerja Defendan Cuma beliau tidak mengingati siapa nama pekerja tersebut.
>
> Selaras dengan hujjah peguam Plaintif dengan mengguna pakai Seksyen 62 Akta Keterangan 1950 dan juga dengan mengambilkira keterangan saksi-saksi, Mahkamah memutuskan tiada keraguan berkenaan kesahihan dokumen di ID4 dan ID5, Mahkamah dengan ini menerima masuk kedua-dua dokumen ini sebagai sebahagian daripada ekshibit dan ditandakan sebagai P4 dan P5.

[18] Learned counsel for the defendant submitted the learned SCJ erred in ruling both the CPO and buyer profile as admissible evidence and converted ID4 and ID5 to P4 and P5 respectively and finding the CPO was not tampered. The grounds for the plaintiff's objection are:

(i) the copy of the CPO tendered in court was a carbon copy and not an original and that the contents of the CPO have been overwritten by hand overshadowing the writing in carbon, hence the CPO was tampered;

(ii) the said CPO cannot be accepted as a primary document under s. 62 of the Evidence Act 1950 ('the Evidence Act');

(iii) the plaintiff claimed that the original CPO had been delivered to the defendant. However, the defendant argued that no one from the defendant's office was called to confirm the statement and no notice pursuant to s. 66 of the Evidence Act was given to the defendant; and

(iv) the said CPO cannot be accepted as secondary evidence under s. 63 of the Evidence Act as the carbon copy of the CPO tendered has been tampered with and overwritten by hand and does not satisfy the provision of s. 63:

> Secondary evidence includes:
>
> (a) ...
>
> (b) Copies made from the original by mechanical process, **which in themselves ensure the accuracy of the copy** ... (emphasis added).

[19] With respect I find the objection of the defendant has no merit and cannot be sustained for the following reasons.

(i) At the trial the original copy of exh. P4 and P5 produced in court and verified by SP3 (the plaintiff) and SP4 (Sharifah Sharmilla) showed that the column below the signature and details of the Consultant Sharifah Sharmila and her code was overwritten over the name and code which have been cancelled. The cancellation and re-writing by SP4 on P4 is not any form of tampering.

There was no evidence adduced by the defendant to show that these documents were in fact tampered with. Under cross-examination, SD1 had admitted that these were the standard documents which the defendant provided to its customers through the Consultant SP4 for execution when the purchase of the gold was made. This can be seen at p. 110 AR:

> PP Now Mr Lim you also can confirm these are the standard documents hah, which is prepared by Geneva, given to the consultants to be used for execution yes?
>
> DW1 Yes.
>
> PP Yes, for execution by the customer?
>
> DW1 By profiles there, CPO ya.
>
> PP These are the 2 documents? Which is the standard document belong to Geneva given to the consultants, correct?
>
> DW1 But the customer declaration form, this is part of the documents.
>
> PP Part of the documents?
>
> DW1 Ya.
>
> PP It originates from Geneva, correct?
>
> DW1 Ya.

(ii) SD1 also agreed that SP4 the paid Consultant who conducted the purchase was duly authorised to act for the defendant in getting the documents signed by the customer:

PP Alright. So basically you would agree with me that, these agents, these consultants act beyond, beyond seeking customers for Geneva. Alright, they introduce your product.

DW1 hmm.

PP They get document signed.

DW1 hmm.

PP They collect all the cheques, send to Geneva.

DW1 Ya.

PP Correct?

DW1 Ya.

PP So dia punya ... role for Geneva?

DW1 Ya.

PP Right, how are these agents paid?

DW1 Come again.

PP How are these agents.

DW1 Agents?

PP I call the consultant, how are the consultant paid?

DW1 Commissions.

PP They have paid commissions?

DW1 Yap.

PP Based on what?

DW1 Based on the customer they introduce.

(iii) At the trial SP4 the Consultant of the defendant who handled the purchase of the gold by the plaintiff admitted that the original document which was in the plaintiff's possession marked "Consultant copy" is the original copy given by SP4 to the plaintiff. It is a carbon copy to the original copy which SP4 admitted to have written on it by SP4 when the purchase of the gold was transacted on 20 September 2012. The evidence of SP4 in cross-examination appears at p. 83 AR:

PD Setujukah dengan saya bahawa ini adalah salinan consultant copy?

PW4 Ya setuju.

PD So ini adalah salinan your copy?

PW4 Ya saya.

PD Setujukah bahawa terdapat satu salinan untuk customer? Customer copy.

PW4 Ya saya.

PD Setuju?

PW4 Setuju.

PD Setujukah bahawa sekiranya CPO telah diterima oleh Defendan, customer copy akan ditandatangani oleh wakil Defendan. Setuju?

PW4 Setuju.

(iv) In evidence in chief, SP4 testified the original copy of both documents together with the bank-in slip of the cheques have been delivered to the defendant and duly acknowledged receipt (Q&A 15(a) p. 146 AR) and the copies of the two cheques which were banked in to the defendant was identified by SP4 (Q&A 15(b), pp. 199-200 AR).

(v) When cross-examined regarding her answer in Q&A 15(a) p. 146 AR, SP4 explained that the defendant acknowledged receipt of the bank in slips for the cheques by signing on the CPO as follows (p. 84 AR):

PW4 Bank in cheques slip once when we bank in the cheque we'll pass it the bank in slip to them, to Genneva.

PW4 On the form that they have signed under the for office. You can see the signature.

PD Can you refer to which documents?

Mah Dokumen mana? Tunjukkan Mahkamah. Dokumen mana yang ada di meja.

PW4 Customer purchase order.

PW4 You can see below there. Sebelah bawah sekali.

PD Yeah I can see. Whose signature is that?

PW4 The Genneva's staff.

PD Who?

PW4 The person who works there who accept.

(vi) The aforesaid evidence was further supported by the evidence of SD1, Mr. Lim Kah Heng, the General Manager of the defendant at the material time of the transaction as his tenure of office was from 3 January 2012 till 27 September 2013. In cross-examination SD1 admitted that the CPO (ID4) and the buyer profile (ID5) were prepared by the defendant for execution of the customer through the consultant (p. 110 AR):

PP You also agree, this particular staff did not write his or her particulars in this acknowledgement?

DW1 Ya.

PP Now Mr Lim you also can confirm these are the standard documents hah, which is prepared by Geneva, given to the consultants to be used for execution yes?

DW1 Yes.

...

PP It originates from Geneva, correct?

DW1 Ya.

SD1 further in cross-examination admitted that the defendant received both documents (p. 109 AR):

PP There is acknowledgement? Right, there is a signature there, there is a date there?

DW1 Hah ya.

PP There is, is there an acknowledgement there?

DW1 But I don't know who is the person.

PP I'm not asking who, is there an acknowledgement appearing on the document?

DW1 Ya.

PP Can you dentify who is the person who signed this document?

DW1 I can't identify.

PP You can't identify. Do you have numerous staffs who accept these documents?

DW1 Yes.

(vii) Explanation 2 to s. 62 of the Evidence Act reads:

Primary Evidence

...

Explanation 2 – Where a number of documents are all made by one uniform process, as in the case printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the content of the original.

The case of *Ooi Thean Chuan v. Banque Nationale De Paris* [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160; [1992] 2 MLJ 526 (HC) best illustrates the application of Explanation 2 to s. 62 of the Evidence Act. At p. 538 F-H, Edgar Joseph Jr. J (as he then was) said:

> In practice, a number of petitions would be made by one uniform process by typewriter or word processor or computer, so that each would be primary evidence of the rest. (See Explanation 2 to s 62 of the Evidence Act 1950 (Rev 1971).
>
> It is often overlooked that there can be more than one original of a document. As far back as 1796, Eyre CJ held in *Gotlieb v. Danvers* 14 that where two copies of the same document are made at the same time, both should be deemed originals. Signed carbon copies may also be deemed originals. In *Durston v. Mercuri*, 15 Menhennitt Jr dealing with a carbon copy of a breath analysis certificate, commented:
>
> I am concerned with a document which is a carbon copy of the original and contains everything that was in the original including the signature. Thus it is in one sense an original. The same hand using the same pen produced at the same time the writing on both the original and the carbon copy. In the case of the original the writing was left by the ink from the pen; in the case of the carbon copy it was left by the carbon from the carbon paper. But the words written were both produced by the same writing. In these circumstances, I am disposed to think that a carbon copy of a document which is a complete copy in every respect including the signature is for all purposes equivalent to the original and admissible in evidence as prime evidence of the contents of the original. (emphasis added)

(viii) In *Tube Home (M) Sdn Bhd v. P Shanmugam & Anor* [2010] 10 CLJ 678; [2010] 1 MLJ 206 Ramly J (as he then was) at p. 698 (CLJ) pp. 228 [69] to [71] and 229 [72] (MLJ) followed the principle propounded in *Ooi Thean Chuan (supra)* and held at 228 [69]:

> [69] The court finds that the letter ID2 amounts to an 'original document' as it is a carbon copy of the same letter sent by the registry to the plaintiff.

I agreed with the views expressed by the learned judges in *Ooi Thean Chuan (supra)* and *Tube Home (supra)*. Hence in my judgment the CPO (ID4) and the buyer profile (ID5) which are carbon copies of the original are admissible as evidence.

(ix) In addition, DW1 admitted that the original copy of "consultant copy" had been handed over and was acknowledged receipt by the defendant. Therefore evidence of carbon copy can be tendered through defendant's employee as per the provision of s. 73A of the Evidence Act 1950. I agreed with the view expressed by the learned judge in *Tube Home* at 229[72] as follows:

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> [72] In any event, although s. 73A of the Evidence Act expressly states the terms 'on the production of the original document', the Act recognises that the original document may not be required under certain exceptions. Section 65(1)(a)(i) of the Act provides that 'secondary evidence may be given of the existence, condition or contents of a document admissible in evidence … where the original is shown or appears to be in the possession or power … of the person against whom the document is sought to be proved'.

B

[20] For the aforesaid reasons, I find there is no evidence of tampering and the learned SCJ has correctly marked ID4 and ID5 as exhs. P4 and P5.

C

Issue 1

[21] Under this heading the learned SCJ concluded there is a valid contract for purchase of gold between the plaintiff and the defendant. At pp. 156-157 AR of her grounds of judgment, she stated as follows:

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> Mahkamah telah melihat keterangan-keterangan yang dikemukakan oleh saksi-saksi dari Plaintif dan Defendan dan membuat kesimpulan berikut. Defendan menyatakan bahawa hanya jika ada perjanjian jual beli maka emas itu akan dihantar kepada pembeli. Adalah jelas disini perjanjian jual beli disediakan oleh Defendan selepas bayaran dibuat oleh pembeli. Didalam konteks tindakan ini, Defendan tidak menafikan menerima bayaran untuk 3000 gm emas itu daripada Plaintif. Persoalannya mengapa tidak disediakan perjanjian jual beli untuk Plaintif tandatangan. Bukan obligasi Plaintif untuk memastikan perjanjian jual beli ditandatangani. Plaintif telah mematuhi proses jual beli yang ditetapkan oleh Defendan dengan mengemukakan ID4 dan ID5 yang mana Defendan akui dokumen-dokumen itu memang kepunyaan mereka. DW1 juga didalam pemeriksaan balasnya mengakui bahawa wakil Defendan telah mengakui terima dokumen-dokumen ini dengan merujuk kepada "For Office Use Only".
>
> Oleh itu dakwaan Defendan bahawa tiada kontrak sah jual beli emas adalah tidak berasas dan tidak boleh bertahan. Defendan tidak boleh bergantung kepada fakta tiadanya perjanjian jual beli ditandatangani kerana perjanjian jual beli perlu disediakan oleh Defendan dan diserahkan kepada Plaintif untuk ditandatangani. Plaintif hanya boleh bergantung kepada ID4 dan ID5 serta bukti pembayaran mengatakan terdapatnya kontrak jual beli emas yang telah wujud sejak 20.9.2012 lagi.

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[22] I observed prior to making the aforesaid finding at pp. 155-156 AR the learned SCJ in gist referred to the plaintiff's reliance on the CPO and the buyer profile (P4 and P5); purchase was made through SP4; production of two cheque butts for the two Maybank cheques (P6) and statement of account (P3) wherein SP2, Nurul Aina binti Rosnan, Maybank officer, Rawang Branch who confirmed that the said two cheques were cleared. The learned SCJ also made mention of the evidence of SD1 during cross-examination regarding the CPO and the buyer profile confirming that the plaintiff had purchased 3,000g of "999.9 Gold" and the signatures of SP4 and the plaintiff were on the two said documents; that these documents were from the

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defendant and "ianya merupakan sebahagian daripada proses pembelian" and confirmed the account number found on "Ikatan B ms. 1 & 2" (P13 and P14 at pp. 199 and 200 AR) belonged to the defendant and the date of encashment of the two said cheques was 20 September 2012 and this meant that payment had been made to the defendant. Thereafter the learned SCJ at p. 156 AR stated:

> Menurut DW1, Defendan sepatutnya menyediakan perjanjian jual beli dan menyerahkannya kepada Plaintif dalam tempoh masa 10-20 hari. Apabila ditanya oleh Peguam Plaintif samada Defendan ada menyediakan perjanjian jual beli itu atau tidak, DW1 menyatakan beliau tidak boleh mengesahkannya. Menurut DW1 lagi, emas-emas tersebut hanya akan dihantar kepada pembeli apabila perjanjian jual beli ditandatangani. DW1 juga mengatakan bahawa hanya apabila bahagian akaun Defendan mengesahkan pembayaran maka perjanjian jual beli akan dikeluarkan.

[23] Learned counsel for the plaintiff submitted there is no basis for the defendant to contend that there was no contract of purchase of the gold between plaintiff and defendant and on evidence adduced it is clear that the contract to purchase the gold was formed on 20 September 2012 and the signing of the formal sale and purchase agreement as alleged by the defendant was a mere formality. Learned counsel in argument cited the following Federal Court authorities and made the following comments:

(i) *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck and Another Appeal* [1978] 1 LNS 42; [1978] 2 MLJ 239 Held 1, p. 240 F right column & p. 242 B left column:

> The court in dealing with the issue of "formation of contract" wherein the payment of earnest deposit was made and only a proforma sale and purchase of property was signed and in the absence of written Sale and Purchase Agreement it was held that there is a binding contract between the parties on the basis that it identified the parties, it specified the subject matter and the purchase price had been identified;

(ii) *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1996] 3 MLJ 327 at p. 325 Held 3 & 4:

> [I]t was decided in this case that in determination of whether there is a valid contract, court should take into account the intention of the parties and such contract can be regarded as "Open Contract" where the court will imply that there is a valid contract which was formed "out of necessity" whereas the signing of contract is only to formalise the existing contract; and

(iii) *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 1 CLJ 233; [1983] CLJ (Rep) 231; [1983] 2 MLJ 39:

> [T]he court has referred to 6 authorities on the issue of "subject to formal contract" including *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck and Another* 2 MLJ 239 (1978) and it was held that there is a valid contract between the parties despite parties did not signed any written contract:

> Held, on the evidence and the exhibits in this case it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written agreement had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. A legally binding and enforceable agreement was concluded on March 3, 1976 and the learned Judge had not erred either in law or fact in arriving at the finding that he did.
>
> (per Abdul Hamid FJ (as he then was))

It is to be noted that out of the 6 authorities cited by Wan Yahya J in *Lim Keng Siong*'s case *(supra)* (as he then was): (i) *Griffiths v. Young* [1970] Ch. 675; (ii) *Bigg & Anor. v. Boyd Gibbins Ltd.* [1971] 2 All ER 183; (iii) *J.N. Roland and Scott Ltd. v. Yangtzekiang Garment Manufacturing Co Ltd.* [1978] 8 Hongkong Law Journal p. 63; (iv) *Harichand v. Govind* [1923] 50 IA 25 (PC); (v) *Shankarlal Narayandas Mundade v. New Mofussil Company Ltd.* [1946] 73 IA 98; and (vi) *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck* [1978] 2 MLJ 239, the Federal Court (p. 49) chose to note only four cases, ie, no. (i), (iv), (v) and (vi).

[24] Based on the circumstances of this instant appeal before me, it is my respectful view that the arguments of the plaintiff, though well argued, do not hold water and cannot be sustained. My reasons are these. The starting point is the CPO relied on by the plaintiff is only an offer to purchase. This is crystal clear from the express wordings of the CPO highlighted by the defendant such as:

> (a) Heading: 'Customer Purchase Order'.
>
> (b) Legend: I/We hereby declare that I/we am/are aware that this offer does not bind GENNEVA **until it is accepted in writing by GENNEVA.**
>
> (c) Clause: I hereby acknowledge receipt of the buyer's order.
>
> (emphasis added)

SD1 in examination in chief (Q&A 7 p. 149 AR) stated:

> If the CPO was accepted by the Defendant, there would be a sale and purchase agreement signed between the Plaintiff and the Defendant wherein it will be provided that the Plaintiff's offer is accepted by the Defendant.
>
> Therefore from the documents in this case, there is no sale and purchase agreement and no acceptance of the Plaintiff's offer by the Defendant.

[25] Learned counsel in the defendant's submission in reply stressed the CPO contained the express provision of "I/We hereby declare that we are aware that this offer does not bind GENNEVA until it is accepted in writing GENNEVA" (hereinafter referred to as the "Condition for acceptance clause").

[26] I shall adopt the terminology of "Condition for acceptance clause" used by counsel for the defendant as my deliberation will show its relevancy and significance. In my judgment the "Condition for acceptance clause" found in the CPO is very important. The significance of the clause is borne out by the Federal Court in *Lim Keng Siong*'s case where Abdul Hamid FJ at p. 48 C-E right column opined as follows:

> The second, in fact, the main line of the respondent's argument is that the position of the parties falls into the second category of the exposition given by Mr. Justice Parker in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284 at pp. 288-289 where it stated:
>
> It appears to be well settled by the authorities that if the documents or letters relied as constituting a contract contemplates the execution of a further contract between the parties *it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract.* In the latter case, there is a binding contract and reference to the more formal document may be ignored. (emphasis added)

[27] I observed when SD1 was cross-examined on the issue of whether there was "acceptance of the offer" in relation to the "Condition for acceptance clause", he answered as follows:

PP	Nothing left there, right. Now I move to on question 7 now. Now your answer in between question 7 is that, the CPO is only stand with the clause above, the buyer signature column, it says I, we hereby declared that we, I, we am, are aware this offer does not buying Geneva until it is accepted in writing by Geneva?
DW1	Ya.
...	
PP	Correct, I put it to you the sufficient acceptance by Geneva in respect of this purchase? Do you agree with me?
DW1	No.
PP	You don't agree with me?
DW1	Hah, because I couldn't have seen any acceptance of the inviting by the Geneva so
PP	But the acknowledgement belongs to Geneva?
DW1	The acknowledgements are on the receipt of all these documents, yes.
...	

PP So I put it to you, there is an acceptance by Geneva in respect of the documents in respect of this purchase?

DW1 **On the document.**

PP Yes?

DW1 **On the document.**

PP **On the document, yes**?

DW1 **Yes.**

...

DW1 Arrangement within Sharifah and Plaintiff ok, I wouldn't know. But from the documents I will say that this is offers to the company.

PP To the company?

DW1 Ya. (emphasis added)

(pp. 118, 119, 120 & 124 AR).

In re-examination, SD1 clarified (p. 133 AR):

PD Thank you. Ok now take you to page 102, which is the CPO. My question, which has in fact in several occasions been asked my learned friend. Has Abdul Ghani Sher Mohamad's offer according to the CPO, was this offer accepted by the company, Geneva Malaysia?

DW1 I couldn't see any acceptance there.

[28] In light of the evidence above, I agreed with the manner learned counsel for the defendant has distinguished the following authorities relied on by the plaintiff:

In the case of *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Another* there was a draft sale and purchase agreement with an increased price prepared by the Developer after the Purchaser had signed the booking pro forma. The Purchaser had rejected the draft sale and purchase agreement. The booking pro forma also contained an express clause that the sale and purchase agreement shall be signed within 2 weeks. In the present case, the price and quantity were never agreed by the Defendant and there was an express "Condition for acceptance clause". Therefore the principles in *Daiman*'s case do not apply to the present case before this Court.

In the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong*, the court held that the court was unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. That is not the case here where the "Condition for acceptance clause" was stamped on the Customer Purchase Order.

> In the case of *Lim Keng Siong & Anor v. Yeo Ah Tee* the court held that it was the intention of the parties to come to a definite and complete agreement on the subject of the sale. The contrary is the case here with the express "Condition for acceptance clause".

[29] Learned defendant counsel submitted "[T]his present case should be decided on its peculiar facts where it is clear that the customer purchase order was only an offer and shall not bind the defendant until it is accepted in writing (by way of a sale and purchase agreement)".

I find there is much force in the submission of the defendant as it is my respectful view that the defendant's case is a case where the Condition for acceptance clause of "I/ We hereby declare that we are aware that this offer does not bind GENNEVA until it is accepted in writing GENNEVA" falls under the first category, to borrow the words of *Von Hatzfeldt-Wildenburg*'s case (which was advocated by the Federal Court in *Lim Keng Siong*'s case), is "a condition or term of the bargain" and not under the second category of "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through", the argument canvassed by the plaintiff.

[30] For the reasons given above, with respect I disagree with the plaintiff's submission that a contract to purchase gold was formed on 20 September 2012 and the signing of the formal sale and purchase agreement was a mere formality. By the same token I find the learned SCJ has erred in her finding that a valid contract to purchase the gold had come into existence on 20 September 2012.

Issue 2

[31] The plaintiff contended that the defendant has breached the contract to purchase 3,000g of 999.9 gold dated 20 September 2012 because the defendant having accepted the purchase of the 3,000g of 999.9 gold made by the plaintiff and having accepted the payment of the purchase price of RM654,000 has failed to make the delivery of 3,000g of 999.9 gold to the plaintiff.

[32] The plaintiff submitted that although the CPO which was signed by the plaintiff and the defendant did not provide the exact date for the delivery of the said gold by the defendant to the plaintiff in law, the defendant is responsible to deliver the 3,000g of 999.9 gold within a reasonable period. In support of its proposition, the plaintiff relied on – s. 36(2) of the Sales of Goods Act 1957:

> (2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

[33] Further the plaintiff referred to the case of *Thomas Borthwick (Glasgow) Ltd v. Bunge & Co Ltd* [1969] 1 Llyod's Rep 17, 28 in which it was decided that even though there is no specific period for the seller to deliver the goods which was purchased, it must be done within reasonable time and failure to do so is a breach allowing the buyer to terminate the contract; and "*The Sale of Goods*" by P.S Atiyah, 8th edn p. 108 where the learned author stated:

> Failure to deliver within a reasonable time (like failure to deliver within a specified time) may amount to a breach of condition by the seller.

[34] Learned counsel for the plaintiff submitted that during trial SD1 admitted that the reasonable period for the defendant to deliver the gold was between 10-20 days which the defendant failed to adhere to. The evidence quoted at p. 112 AR is as follows:

> PP So Mr Lim, if the payment has been made in respect of this customer around 20th September 2012, when were you supposed to deliver, when were Geneva, sorry, Geneva supposed to deliver the sale and purchase contract to the customer?
>
> DW1 Hah hah.
>
> PP When were they supposed to deliver the sales and purchase contract to the customer?
>
> DW1 Depends on the procedures against
>
> PP Estimate, approximately when?
>
> DW1 But they need time will be, range from 10 to 20 days.
>
> PP 10 to 20 days?
>
> PP You couldn't confirm. But you had confirmed based on this document payment has been made to Geneva?
>
> DW1 Ya.
>
> PP Alright now, when were the gold supposed to be delivered? Approximately how many days thereafter?.

[35] With respect I have perused the evidence of SD1 and I find the excerpt of SD1's evidence given in cross-examination was not quoted by the plaintiff in full. For comprehension of SD1's evidence on this point it is pertinent to reproduce SD1's evidence (pp. 112-114 AR) continuing from where the plaintiff left of (see para 34 above):

> DW1 **Depends on when customer have sign the S&P**.
>
> PP Depends on the customer sign the S&P?
>
> DW1 Hah.

PP Whose duty is to get the S&P signed?

DW1 The customers.

PP The customers duty.

DW1 Hah.

PP To get the sale and purchase, the gold agreement signed?

DW1 **Hah, because we do the business based on syarat (*sic* - syariah) principal.**

PP Fine, you said that it was the customers duty to get to sign the sale and purchase gold agreement?

DW1 Ya.

PP Whose duty was to invite the customer to sign the sale and purchase agreement?

DW1 **Just like what I say just now, after the account department has verified the payments, those the S&P will be issued out to the customers to sign.**

PP Fight, S&P will be issued by Geneva?

DW1 Ya.

PP Correct.

DW1 Ya.

PP **So in this case, the Geneva issued the S&P to the customer to sign**?

DW1 **I couldn't confirm because I couldn't see any S&P here.**

PP **You couldn't confirm.**

DW1 Hah.

PP Now, is there any document from Geneva to show that the document, let's say let me just has been furnished to the customer to sign?

DW1 We also cannot

PP There is no evidence here?

DW1 We also cannot

PP There is no evidence here?

DW1 We also cannot

PP Is there evidence

DW1 Hah hah

PP **Showing Geneva making effort to deliver the gold to customer in this case?**

DW1 **There is no document show.**

PP **There is no documentary evidence, correct?**

DW1 **Ya, no.**

(emphasis added)

[36] I observed from the long segment of SD1's evidence quoted in para. 35 above, in response to the plaintiff's question of when was the gold supposed to be delivered; SD1 said "Depends on when customer have sign the S&P" followed by SD'1 answers as I have emboldened above. Thereafter to the question of "Is there any document from Genneva to show that the document has been furnished to the customer to sign?" I find SD1 did not say that there is no evidence. At p. 114 AR when SD1 said "There is no document here", it was an answer made to plaintiff counsel's question of "Is there evidence … [s]howing Geneva making effort to deliver the gold to customer in this case?"

[37] In light of the evidence which I have alluded to, I find the plaintiff's submission that SD1 "admitted that the reasonable period to deliver the gold is between 10-20 days" is misleading and inaccurate; when in actual fact SD1 said "Depends on when customer have sign the S&P" which unfortunately the plaintiff counsel failed to pursue SD1 for an answer but instead plaintiff counsel digressed to a different line of questioning of "Is there evidence … [s]howing Geneva making effort to deliver the gold to customer in this case?" and *to wit*, SD1 answered, "There is no document here."

[38] In light of the evidence above, I also find the statement of the learned SCJ in her grounds of judgment that "Menurut DW1, defendan sepatutnya menyediakan perjanjian jual beli dan menyerahkannya kepada plaintif dalam tempoh masa 10-20 hari" (p. 156 AR) and "Melalui keterangan DW1, sepatutnya selepas menerima bayaran, bahagian akaun defendan akan membuat pengesahan dan menyediakan perjanjian jual beli dan menghantarnya kepada pembeli dalam masa 10-20 hari dan penghantaran emas itu bergantung kepada pembeli menandatangani perjanjian jual beli" (pp. 157-158 AR) is factually inaccurate.

[39] I find the learned SCJ erred in her finding that "Kegagalan defendan menyediakan perjanjian jual beli itu telah terjumlah kepada pemecahan kontrak oleh defendan" for two reasons. The first reason is because the period of 10-20 days was only the normal procedure of the defendant and cannot be treated as a condition. This can be seen from the flow of the evidence and the context SD1 gave the answer at p. 112 AR:

PP So Mr Lim, if the payment has been made in respect of this customer around 20th September 2012, when were you supposed to deliver, when were Geneva, sorry, Geneva supposed to deliver the sale and purchase contract to the customer?

DW1 Hah hah.

PP When were they supposed to deliver the sales and purchase contract to the customer?

DW1 Depends on the procedures against

PP Estimate, approximately when?

DW1 But they need time will be, range from 10 to 20 days.

PP 10 to 20 days?

DW1 Ya.

PP **Now, what is case Mr Lim**?

DW1 Hmmm.

PP **What is case? Did Geneva Malaysia Sdn Bhd, arrange to forward the sales and purchase of the gold agreement to the customer for execution**?

DW1 From this limited documents, I couldn't have make an assumptions. Because

PP **You couldn't confirm**?

DW1 **Ya, I couldn't confirm.**

(emphasis added)

The above excerpt was quoted by the plaintiff at para 34 above but unfortunately there are some omissions as shown by the emboldened parts.

[40] The second reason is that the CPO is dated 20 September 2012. The evidence showed that ten days later, on 1 October 2012, Bank Negara Malaysia raided the defendant's premises and seized all the gold stock, cash, documents, files and computer records of the defendant. The raid was conducted to assist Bank Negara Malaysia in their investigations under the Banking and Financial Institutions Act 1989 (BAFIA) and the AMLATFA. All of the defendant's bank accounts were also frozen. There are two orders. One is an order dated 1 October 2012 under s. 44 of the AMLATFA (D19 pp. 278-281 AR) issued by Bank Negara and the other is an order dated 18 December 2012 under s. 50 AMLATFA (D20 pp. 282-284 AR) issued by the Public Prosecutor. SD1 testified in examination in chief (Q&A 18 p. 152 AR) and confirmed in re-examination that the defendant cannot conduct any further business. Hence I agree with the defendant's submission

that on a balance of probabilities, (i) the defendant has not accepted the plaintiff's offer and (ii) the defendant cannot be held to be in breach from 1 October 2012 as the defendant could not accept the plaintiff's offer and prepare the sale and purchase agreement.

[41] For the aforesaid reasons, with respect I find the submission of the plaintiff that based on the evidence and the authorities, there is clear breach of contract of purchase of gold between the plaintiff and the defendant dated 20 September 2012 and the learned SCJ correctly held that the defendant is liable to return the amount paid to the plaintiff in the sum of RM654,000 with interest and costs is unsustainable.

[42] Premised on my findings that the answers to Issue 1 and Issue 2 is in the affirmative, it is my respectful view that the plaintiff has failed to prove the plaintiff's case and the appeal of the defendant is allowed on both Issues 1 and 2.

Issue 3

[43] Assuming I err in my findings on both Issues 1 and 2, I now turn to Issue 3. In respect of this issue the learned SCJ in her grounds of judgment (p. 159 AR) stated:

> Isu terakhir adalah sama ada tuntutan Plaintif adalah pra masa dan Plaintif perlu mendapatkan kebenaran daripada Pendakwaraya selaras dengan Seksyen 54(3) AMLA 2001. Keterangan daripada SP1 – Mohd Idham Bin Mohd Kenali dari Jabatan Perisikan Bank Negara mengesahkan bahawa tiada sebarang kebenaran yang diperlukan daripada Pendakwaraya untuk memulakan tindakan di Mahkamah ini. Ini disokong oleh surat beliau di P1 (pp. 170-171 AR) dan P2 (pp. 172-173 AR) (Ikatan A mukasurat 11-12).

[44] The plaintiff's argument is two-fold:

(a) that no prior sanction needs to be obtained by the plaintiff from the Public Prosecutor under s. 54(3) of the AMLATFA before the plaintiff commenced his action against defendant because this action is only confined to the claim for breach of contract to purchase 3,000g of '999.9 Gold' and not a claim against any of the defendant's assets which have been seized and frozen under s. 50(1) of the AMLATFA.

(b) through a letter dated 7 March 2016 (pp. 172-173 AR) from SP1, Mohd Idham bin Mohd Kenali, an officer of Bank Negara Malaysia and his oral testimony confirming that no sanction was required from the Public Prosecutor for plaintiff to initiate legal action against the defendant as it did not involve any of defendant's assets which have been seized.

[45] The plaintiff relied on the case of *Dato' Zahari Sulaiman v. Genneva Sdn Bhd* [2011] 6 CLJ 219 submitting: A

> [I]n allowing an application for summary judgment against the Defendant under Order 14, Y.A. Ariff Yusof J held that the sanction of the Public Prosecutor is not required for purpose of initiating legal action against the Defendant as the action initiated is not against the assets seized pursuant to the provision of s. 54(3) AMLATFA. B

Learned plaintiff counsel quoted the following excerpt:

> Held (allowing encl. 3 with costs; dismissing encl. 8 with costs):
>
> (1) Section 54 of the Act is headed "Dealing with property after seizure to be void". It is obvious from this heading and the contents of this section that the reference to an action, suit or proceeding of a civil nature has to be related to the property seized, which in this instance consisted of the numerous banking accounts. Section 54(3) of the Act cannot be read the way the defendant wanted it to be read, for to do so will interfere with the general fundamental right of a citizen to resort to court process and access to justice for the determination of his dispute. Section 54(3) of the Act, as presently worded, cannot be reasonably interpreted as imposing a general restraining order on all suits, actions or proceedings as against all litigants or potential litigants, irrespective of the properties seized. To read this provision as imposing a kind of restraining order on the legal process generally will contravene s. 17A of the Interpretation Acts 1948 and 1967. (para 7). C D E

[46] Further learned counsel for the plaintiff drew to the court's attention Mohamad Ariff Yusof J's observation at pp. 223-224 and submitted:

> [I]t is to be observed that] [Ariff] J had placed reliance on the principles of law stated in the case of *Kekatong Sdn Bhd v. Dana Harta Urus Sdn Bhd* [2003] 3 CLJ 378 and viewed that if the legislature had intended that the Plaintiff be prevented from initiating a claim under s. 54(3) of AMLATFA it would have expressly worded the section as such. See Yang Arif Ariff Yusof J's observation at pp. 223-224 as follows: F
>
> If it is to be excluded, it will require clearer words than those appearing in s. 54(3). Such a reading of the statutory provision will be in keeping with the common law principle of statutory interpretation that requires courts to interpret statutes so as not to interfere with vested rights, unless the statute clearly states so. It will also be in line with s. 17A of our Interpretation Act which requires courts to adopt a purposive interpretation and adopt an interpretation that will promote the purposes and objects of the statute rather than the reverse. Therefore, with all respect due, the defendant's argument is untenable. Section 54(3), as presently worded, cannot be reasonably interpreted as imposing a general restraining order on all suits, actions or proceedings as against all litigants or potential litigants, and irrespective of the properties seized. To read this provision as imposing a kind of restraining order on legal process generally will, in my view, fall foul of s. 17A of the Interpretation Act. G H I

[47] With respect I am persuaded by the defendant's argument that the plaintiff's claim is premature and/or statute-barred for non-compliance of s. 54(3) of the AMLATFA as the plaintiff has not obtained the Public Prosecutor's consent to file this suit and its reliance on the decision of Vazeer Alam Mydin Meera JC (as he then was) in the case of *Daud bin Mohamad & 8 Ors. v. Geneva Malaysia Sdn Bhd & 4 Ors.*, KLHC Civil Suit No. 22NCVC-1490-12-2012 dated 30 April 2014. My reasons are these.

[48] I find the plaintiff's submission that its claim is not against the seized assets but is for a breach of contract is with respect misconceived. It is my finding that there is no established contract. What the plaintiff is in fact seeking (though not pleaded in that manner) is for the refund of the money which according to SP4 was deposited by the plaintiff into the defendant's bank account, CIMB Account No: 14560000662104. The orders dated 1 October 2012 under s. 44 AMLATFA and order dated 18 December 2012 under s. 50 AMLATFA showed that the monies in the CIMB Account have been frozen and have been seized. This will become apparent when I refer to the relevant parts of Vazeer JC's judgment in *Daud bin Mohamad*'s case.

[49] In my view the defendant's reliance on *Daud bin Mohamad*'s case is appropriate as the facts of the present case is somewhat similar to the former. In *Daud bin Mohamad*'s case *(supra)* the plaintiffs were customers of the first defendant and had entered into individual contracts to invest in a gold investment scheme operated by the first defendant. The second to third defendants were directors of the first defendant. The first defendant marketed and promoted the gold investment scheme as being *Syariah* compliant. The plaintiffs alleged that they have individually paid monies to the first defendant to purchase the gold and invest in the scheme and that the gold was never delivered to them. The plaintiffs, amongst others, are seeking the refund of the monies they allege that they have paid to the first defendant and monies worth for the gold that they surrendered as part of the renewal of their investment with the first defendant.

[50] The main argument of the first defendant in *Daud bin Mohamad*'s case is that the suit is statutorily barred as the prior written consent of the Public Prosecutor pursuant to s. 54(3) AMLATFA has not been obtained and that the lack of consent is fatal to the plaintiff's claim as such a claim is prohibited under s. 54(3) AMLATFA. Vazeer JC found merit in the first defendant's submission for the following reasons which I reproduce as they are relevant to the present case:

> [7] Now, section 44(1) and (2) of AMLA states that:
>
> (1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been, is

being or is about to be committed by any person, it may issue an order freezing any property of that person or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.

(2) An order under subsection (1) may include:

(a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order; and

(b) an order to authorise any of its officers to take custody and control of the property, or such part of the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require.

[8] The 1st Defendant has produced an order dated 1.10.2012 issued by the Bank Negara Malaysia under section 44 of AMLA ("the 1st Order")(pages 71-74 of Bundle I) freezing the monies of the 1st Defendant's bank accounts. This would include CIMB Bank Account Number 14560000662104 of the 1st Defendant into which the Plaintiffs allege having paid or deposited their monies ("the CIMB Account"), which monies they now claim under this suit. The 1st Order also restrains the 1st Defendant from disposing or dealing with any of its property. I agree with submissions of Defendants' counsel that the 1st Order under section 44 of AMLA has the effect of freezing the monies in all the 1st Defendant's bank accounts and is prohibited from making any payment out of any of its bank accounts. The 1st Order was valid for a period of 90 days from the date of the Order.

[9] Subsequently, a further order was issued on 18.12.2012 by the Public Prosecutor under the provisions of section 50(1) of AMLA (pages 75-77 of Bundle I) freezing the monies in the 1st Defendant's bank accounts including the CIMB Account. Section 50(1) of AMLA reads:

(1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or a terrorism financing offence or evidence in relation to the commission of such offence or which is terrorist property, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

[10] The 1st and 2nd Orders have a further effect as provided in section 54 of AMLA that reads:

> (1) Where any property has been seized under this Act, and so long as such seizure remains in force, any dealing effected by any person or between any persons in respect of such property, except any dealing effected under this Act by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government, or the Government of a State, or a local authority or other statutory authority, shall be null and void, and shall not be registered or otherwise be given effect to by any person or authority.
>
> (2) Subsection (1) shall be in addition to and not in derogation of subsections 51(3) and (4).
>
> (3) For so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been so seized, and no attachment, execution or other similar process shall be commenced, or if any such process is pending immediately before such seizure, be maintained or continued, in respect of such property on account of any claim, judgement or decree, regardless whether such claim was made, or such judgment or decree was given, before or after such seizure was effected, except at the instance of the Federal Government or the Government of a State, or at the instance of a local authority or other statutory authority, or except with the prior consent in writing of the Public Prosecutor.

[11] There is specific reference in both the 1st and 2nd Orders to the CIMB Account. In the 1st Order that reference is found in the Attachment to the Order where the CIMB Account is specifically referred as being affected by the Order. And in the 2nd Order it is found in the body of the Order itself. It would be useful to reproduce the relevant part of the 2nd Order for ease of reference.

> To:
>
> CIMB ISLAMIC BANK BERHAD
> Head Office
> Kuala Lumpur
>
> WHEREAS I, ANSELM CHARLES FERNANDIS, Deputy Public Prosecutor being satisfied on the information given to me by HUSEIN BIN ZAKARIA Investigating Officer that the moveable property including any monetary instrument or any accretion to it, as set out below:-
>
> ...

(vi) GENNEVA MALAYSIA SDN BHD
(BUSINESS REG. NO.592576-A)
Current Account No.14560000662104

...

is the subject matter of an offence under subsection 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (the Act) or evidence in relation to the commission of such offence.

NOW PURSUANT to subsection 50(1) of the Act, it is hereby ordered that you, your employee or your agent are not to part with, deal in, or otherwise dispose of such property or any part of it until this Order is otherwise revoked or varied.

TAKE NOTICE THAT failure to comply with this Order is an offence under the Act.

Dated: 18 December 2012

(Signed)

Deputy Public Prosecutor

[12] *From a reading of section 54 of AMLA it is clear that so long as a seizure of any property under this AMLA remains in force, no action, suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been so seized. At the time of institution of this suit and the trial of the action, the 2nd Order was still subsisting and therefore, the freezing of the 1st Defendant's CIMB Account was effective and in force.*

[13] *The Plaintiffs have not obtained the requisite prior consent of the Public Prosecutor, as required under section 54(3) of AMLA. As such I find that the institution of this suit is contrary to the prohibition under the said section 54(3) of AMLA and the action cannot be maintained.*

(emphasis added)

[51] I find the dicta of Mohamad Arif Yusoff J in the case of *Dato' Zahari Sulaiman (supra)* relied on by learned counsel for the plaintiff which is referred to in paras 45 and 46 above has been considered by Vazeer JC at para 14 of His Lordship's judgment. I agreed with the view expressed at para. 15 by the learned JC:

[15] I agree with the view of my learned brother that section 54(3) AMLA cannot be read as imposing a general restrain (sic) on legal process. The restrained *(sic)* must be confined to the property seized. On the facts of that case, it is not clear if the monies being claimed by the plaintiff therein were paid into the various bank accounts that were seized or frozen. *However, in the context of the facts of the case before me now, there is evidence that the monies alleged to have been paid by the plaintiffs and now claimed by the*

A *plaintiffs were paid into the CIMB Account, which is frozen under the 2nd Order. Therefore, it relates to properties seized or frozen by order of the Deputy Public Prosecutor. In the premise, the very subject of the present claim is covered under the 2nd Order, and as such, I am of the opinion that the clear stipulation of section 54(3) of AMLA requiring the prior written consent of the Public Prosecutor becomes operational. The Plaintiffs would have to seek the prior written consent of the Public*
B *Prosecutor before instituting this action. Alternatively, the Plaintiffs could avail themselves of the provisions of section 60(1) of AMLA to seek a return of their monies in the CIMB Account.* (emphasis added)

[52] I am mindful of the evidence of SP1 who testified that no prior consent from the Public Prosecutor is necessary. However based on the facts of this
C case and the lucid legal reasoning of the learned JC in *Daud Bin Mohamad*'s case (para 51 above) which I adopt in its application to the present case, I find the plaintiff's claim is premature and unlawful since the plaintiff has not obtained the requisite prior consent of the Public Prosecutor under s. 54(3) of the AMLATFA prior to filing this action.

D **[53]** For the foregoing reasons I find the learned SCJ erred in her finding that the action by the plaintiff is valid and lawful as no prior sanction from the Public Prosecutor is required under s. 54(3) of the AMLATFA.

Conclusion

E **[54]** For the reasons discussed above my findings are:

(a) Issue 4 – The CPO and the buyer profile have not been tampered;

(b) Issue 5 – The CPO (ID4) and the buyer profile (ID5) have been correctly converted to exhs. P4 and P5 respectively;

F (c) Issue 1 – There is no valid contract to purchase gold between the plaintiff and defendant;

(d) Issue 2 – The defendant has not breached the contract to purchase the 3,000g of 999.9 gold dated 20 September 2012; and

G (e) Issue 3 – The plaintiff's claim is premature and unlawful for failure to obtain sanction from the Public Prosecutor under s. 53(4) AMLATFA prior to instituting this action.

[55] Since I have found the learned SCJ has erred in her findings in respect of Issues 1, 2 and 3, it warranted appellate interference. Hence the order in
H para 2 above.

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